

No. 14,494

IN THE

United States Court of Appeals
For the Ninth Circuit

BARTOLOMEO MONGE,

Appellant,

VS.

JAMES G. SMYTH, former Collector of
Internal Revenue for the First District
of California, and GLEN T. JAMISON,
Director of Internal Revenue,

Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF AND APPENDICES FOR APPELLEES.

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BRIEF AND APPENDICES FOR APPELLEES.

OPINION BELOW.

The opinion filed by the District Court when it dismissed taxpayer's original complaint as first amended (R. 25-27)¹ is reported at 100 Fed. Supp. 821.² When

¹The reference R. is to materials found in the printed record on appeal.

²This proceeding is before this Court for the second time. This Court's opinion, dismissing without prejudice the prior appeal, is reported at 198 F. 2d 744.

the taxpayer's action after remand from this Court was finally dismissed by order of the District Court, the District Court did not write a subsequent opinion.

JURISDICTION.

This appeal involves an action to restrain the collection of Federal income taxes, penalties and interest assessed for the tax years 1942 to and including 1946. On November 2, 1949, taxpayer signed a waiver (Treasury Department Form 870 T. S.) of restrictions on assessment and collection of deficiencies in Federal income taxes, penalties and interest for the years 1942 to and including 1946.³ On July 5, 1951, this action was commenced by the filing of a complaint to enjoin the collection of the taxes, penalties and interest assessed pursuant to the waiver agreement. It was alleged that the suit arose under the provisions of 28 U. S. C., Section 1340. (R. 3-5.) On order of the District Court, this complaint was dismissed; a petition for rehearing was filed and denied on April 8, 1952. (R. 31-32.) Within the prescribed period taxpayer noticed an appeal to this Court. (R. 32.) On September 3, 1952, this Court ordered that the appeal be dismissed without prejudice. (R. 32.) On remand

³For the convenience of the Court and for the purpose of subsequent reference and discussion, the waiver form executed by taxpayer on November 2, 1949, and accepted and executed for the Commissioner by his authorized agents is printed in Appendix B of this brief. This document, printed in Appendix B, is part of the record certified to this Court by the District Court. Waiver form 870 T.S. is also reproduced in the opinion in *United States v. Goldstein*, 189 F. 2d 752 (C.A. 1st).

and after taxpayer filed a second amended complaint, the District Court, by order dated June 30, 1954, dismissed the action. (R. 48.) Within sixty days and on July 21, 1954, notice of appeal was filed. (R. 49.) The jurisdiction of this Court is invoked pursuant to the provision of 28 U. S. C., Section 1291.

QUESTION PRESENTED.

Whether the District Court correctly concluded that taxpayer's action to enjoin collection of federal taxes should be dismissed where his allegations failed to show the existence of extraordinary circumstances or statutory grounds which would remove the specific prohibition against suits to enjoin federal taxes framed by Section 3653(a) of the Internal Revenue Code of 1939?

STATUTES AND REGULATIONS INVOLVED.

These appear in Appendix B, *infra*.

STATEMENT.

The District Court did not make findings of fact and the parties did not file a stipulation of facts. The case was presented to the District Court on pleadings, affidavits, motions, petition and briefs in support of the motions and petition. The course of the proceedings, as reflected in the pleadings, motions and orders of the Court, is substantially as follows:

This action was commenced by the filing, on or about July 5, 1951, of a complaint for injunction, rescission of waiver of restriction on assessment and collection of deficiency in tax and other relief. (R. 3-6.)⁴ In this complaint taxpayer alleged that the Collector had distrained his real property and both his bank accounts; that the Collector's action was taken pursuant to an assessment, made on or about December 28, 1949, of income taxes, penalties and interest for the years 1942 to and including 1946 and that this assessment was made in accordance with a waiver of restrictions on assessments and collection of deficiency in tax executed by the taxpayer on November 2, 1949. (R. 3-4.)

With regard to this waiver, taxpayer's complaint alleged that he had executed it in reliance upon the advice of his attorney, Abraham Buchman, who, prior to the execution of the waiver, represented him in conferences with representatives of the Internal Revenue Service. It was further alleged that Abraham Buchman, at the same time that he represented taxpayer,

⁴Attached to this complaint, as Exhibits A and B, were affidavits of the taxpayer and his attorney, Wareham Seaman. (R. 7-9.) Taxpayer's affidavit concerns facts relative to the negotiations which resulted in compromising certain tax liabilities asserted against him and in his execution of a certain waiver of restrictions on the assessment and collection of the compromised tax liability. The affidavit of taxpayer's attorney concerns the nature and result of the attorney's dealings with the Internal Revenue Service with respect to administrative treatment of taxpayer's tax liability after the waiver of restrictions on assessment and collection had been executed by the taxpayer. Since these affidavits are not felt to be material to the issues here involved and since they do not readily lend themselves to summarization, this statement does not deal with the materials there set out.

was representing persons having an interest in taxpayer's tax liability adverse to the taxpayer; that such adverse interest was known to representatives of the Internal Revenue Service but was not known to taxpayer or disclosed to him by Buchman; that Buchman, for reasons adverse to taxpayer's interest, advised and induced taxpayer to execute the waiver. (R. 4-5.) Because of the execution of the waiver, the complaint alleges, income taxes greatly in excess of the correct tax liability were assessed and fraud penalties were added although taxpayer was not guilty of fraud; that taxpayer was deprived of administrative remedies otherwise available to him; that taxpayer's bank accounts and real property had been seized and as a result of this seizure of his property taxpayer was without sufficient funds to conduct his business or to defray his living and medical expenses. (R. 5.)

It was additionally alleged that taxpayer had exhausted the administrative remedies available to him; that he had no adequate remedy at law and that unless the Collector was restrained from selling his property or otherwise restrained from collecting the assessed taxes, and unless the property previously seized (funds in the bank accounts) was restored, taxpayer would suffer great and irreparable injury. (R. 5.)

In the wherefore clause taxpayer demanded (a) that the Collector be enjoined from selling his property or from taking any other action to collect the taxes and penalties assessed for the years 1942 to 1946, (b) that the Collector be ordered to restore the property previously seized, (c) that the waiver of restrictions

on assessment and collection executed by taxpayer be rescinded, cancelled, annulled and set aside, (d) that taxpayer have such other and further relief as is just. (R. 6.)

On September 6, 1951, the Collector filed a motion to dismiss taxpayer's complaint. The reasons for the motion were (1) "Lack of jurisdiction over the subject matter in that this is a suit to enjoin collection of Federal income taxes" and (2) failure to state a claim upon which relief could be granted because the taxpayer nowhere denied that he owed some Federal taxes. (R. 20.)

Before the District Court acted on this motion, taxpayer, on September 28, 1951, filed an "Amendment to Complaint" with supplemental affidavit attached. (R. 21-24.)⁵ This amendment purports to amend the original complaint by adding a second count. The allegations begin with paragraph numbered 7 and consist only of paragraphs 7 and 8 and a wherefore clause. Paragraph 7 incorporates by reference paragraphs 1, 4, 5 and 6 of the original complaint.⁶ Paragraph 8 is the allegation of facts upon which the second cause of action is predicated. With respect to this second

⁵The reasons why the previous affidavits are not summarized (see footnote 4 above) are equally applicable to this supplemental affidavit.

⁶These paragraphs incorporated by reference refer to the allegations of jurisdiction, that administrative remedies have been exhausted, that irreparable injury will be suffered if collection is not enjoined and that taxpayer has no adequate remedy at law. (R. 2-5.)

count, it is alleged that the Collector's action was taken pursuant to jeopardy assessments of income taxes, penalties and interest made on or about December 28, 1949; that such jeopardy assessments were made before any notice in respect to the tax had been mailed to taxpayer under Section 272(a) of the Internal Revenue Code and that no such notice was mailed to taxpayer within sixty days after the making of the jeopardy assessment. (R. 21-22.)

The demands made in the wherefore clause of the Amendment to the Complaint are the same as in the original complaint except that where the original complaint demands that the Collector "be enjoined * * * from selling plaintiff's property or taking any other action to collect income taxes, penalties or interest pursuant to the assessments made against plaintiff on or about December 28, 1949 * * *", the amendment reads that the Collector "be enjoined * * * from selling plaintiff's property or taking any other action to collect income taxes, penalties or interest pursuant to the *jeopardy* assessment made against plaintiff on or about December 28, 1949 * * *." (Italics supplied; R. 6, 22-23.)

In an opinion filed on October 15, 1951, the District Court granted the Collector's motion to dismiss. (R. 25.)⁷ The dismissal was predicated upon the failure

⁷Pursuant to its opinion, the District Court on or about October 17, 1951, entered its order of dismissal. Subsequently, and on or about October 18, 1951, taxpayer filed a petition for rehearing. This petition was denied on April 8, 1952. Thereafter, taxpayer

of the allegations of taxpayer's complaint to show unusual or extraordinary circumstances which would cause the specific prohibition against suits to enjoin collection of Federal taxes provided for by Section 3653(a) to be inapplicable. In commenting on taxpayer's claim that an injunction was warranted because of so-called arbitrary and oppressive conduct on the part of Government agents, the Court in its opinion said (R. 26) :

In the case at bar, the improper conduct, if any, at the conferences, at which the compromises were reached, was that of plaintiff's agents and not that of the Government's representatives. This does not establish the "extraordinary circumstances" or "arbitrary and oppressive conduct of Government agents." This case does not present a situation calling for this Court to exercise its equitable powers to enjoin the collection of a tax.

On October 24, 1951, the Collector filed a motion, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for summary judgment. (R. 27-28.) The ground for this motion was that there was no germane issue as to any material fact presented by the complaint or amendment thereto. (R. 27.) On November 13, 1951, the District Court signed an order denying the Collector's motion for summary judgment. How-

filed a notice of appeal to this Court requesting review of the District Court's order denying the petition for rehearing. On September 3, 1952, because no appealable questions were involved, this Court dismissed the appeal without prejudice. (R. 31-32.) See also *Monge v. Smyth*, 198 F. 2d 744 (C.A. 9th).

ever, this order was not filed until December 7, 1951.⁸ (R. 31.)

On November 21, 1951, the Collector filed an answer to taxpayer's second cause of action framed by the amendment to the original complaint. In this answer the allegations of paragraph 7 of the amendment to taxpayer's original complaint were denied except that it was admitted that the action arose under 28 U.S.C., Section 1340, as alleged. (R. 29.) The allegations of paragraph 8 of the amendment (that the assessment of December 28, 1949, was a jeopardy assessment) were denied except that it was admitted that a notice of tax lien against taxpayer's property had been filed and that certain sums had been collected. (R. 29-30.) As a separate and further defense, the Collector alleged that he had been suspended from office on September 27, 1951 and was therefore not a proper party to the action. (R. 30.)

After this Court's dismissal of the appeal and the remand of the action, the Collector filed, on March 11, 1953, a motion to dismiss "the action and all causes of action stated in the complaint including all amendments thereto." (R. 33.) The reasons given for the motion were (a) that the Court "has no jurisdiction over the subject matter of the action in that this is an action to enjoin the collection of Federal taxes" and

⁸It is clear that the record, when it was first before this Court, contained not only the complaint and amendment to the complaint but in addition the Collector's motion for summary judgment, his answer to the amendment to the complaint and the District Court's order denying the motion for summary judgment. (R. 31-32, 34.) See *Monge v. Smyth*, *supra*.

(b) that the complaint and amendment thereto failed to state a claim upon which relief can be granted because taxpayer does not deny that he owes some Federal taxes. (R. 33.)

On December 29, 1953, the District Court entered a memorandum and order dismissing the taxpayer's first amended complaint (the original complaint and amendment thereto) with leave to amend within thirty days. (R. 34-35.) In the memorandum, the District Court pointed out that before the present motion was filed, it had granted a motion to dismiss taxpayer's first amended complaint but did not dismiss the action; that an appeal to the Circuit Court of Appeals had been taken but dismissed because no appealable question had been presented; that when it had granted the prior motion to dismiss both the original and first amended complaint were before the court; that the only new allegations now before the court were those contained in the affidavit filed in opposition to the motion to dismiss the action; that the amended complaint does not contain sufficient allegations to invoke the jurisdiction of the Court and therefore must be dismissed; but, however, because the affidavit filed in opposition to the Collector's motion suggests that taxpayer can amend his complaint so as to invoke the court's jurisdiction, leave is given to so amend. (R. 34-35.)

On October 21, 1953, taxpayer filed a second amended complaint for injunctive relief to which he attached his affidavit as Exhibit A. In this complaint both James G. Smyth, Collector, and Glen T. Jamison,

Director, and successor in office to Smyth (hereinafter referred to as the Director) were named as defendants. This second amended complaint purports to state two separate causes of action for each of which taxpayer prays the Court to restrain collection, restore his property and rescind the waiver agreement.⁹ As a first cause of action, taxpayer alleges that certain taxes, penalties and interest totalling \$43,313.08 for the tax years 1942-1946 had been assessed, when, in fact, he did not owe this sum or any other sum as taxes, penalties or interest for the years in question; that the assessment was in violation of Section 272 (a)(1) since no notice, as required by Section 272 of the Internal Revenue Code, had been served upon him; that the Collector, acting through his agents, filed or caused to be filed on January 4, 1950, a tax lien against all of taxpayer's property, and levied and seized on or about March 27, 1951, bank accounts in the amounts of \$8,526.42; that on or about April 8, 1952, the Director, acting through his agents, seized for sale all of taxpayer's real and personal property but that such sale had been enjoined by the District Court. (R. 37-38.) It was further alleged that taxpayer had exhausted all administrative remedies available to him; that because of the seizure, taxpayer was without sufficient funds to conduct his business or defray his living and necessary medical expenses

⁹This second amended complaint does not contain allegations that the conduct of the Government agents was arbitrary and oppressive. Likewise the taxpayer's affidavit attached does not contain statements concerning circumstances resulting from the execution by him of the waiver agreement.

and that unless sale of his property is restrained and unless his property is restored and the assessment set aside, he will suffer great and irreparable injury. Additionally it is alleged that taxpayer had no adequate remedy at law. (R. 36-38.)

The taxpayer's prayers in his wherefore clause are essentially the same as those contained in his original complaint filed on July 5, 1951. (R. 6, 39.)

The allegations set forth as a second and separate cause of action are the same as those alleged for the first cause of action except that it is alleged that "during the month of January 1950 the Collector levied a *jeopardy* assessment¹⁰ against taxpayer for taxes, penalties and interest for the years 1942 to 1946 in the total amount of \$43,313.08, when in truth and in fact, taxpayer did not owe any taxes, penalties or interest for the years 1942 through and including 1946"; that the Collector and Director, their agents, servants and employees, did fail and have not to date served taxpayer with notice as required by Section 273(b) of the Internal Revenue Code. (R. 40-41.)

The prayers of the wherefore clause set forth as part of the second separate and distinct cause of action are essentially the same as the prayers made in the wherefore clause of the first cause of action and the wherefore clause of the amendment to the

¹⁰It is noteworthy that taxpayer in his second amended complaint alleges that the so-called jeopardy assessment was a levy made in January 1950, whereas in his amendment to the original complaint, he alleges that the so-called jeopardy assessment was the notice of December 28, 1949. (R. 22, 41.)

complaint filed on September 28, 1951. (R. 22-23, 39, 42.)

On October 21, 1953, the District Court entered an order to show cause directing the Collector and the Director to show cause why they should not be enjoined during the pendency of the proceedings from any further seizure or sale of taxpayer's property or any further execution or collection of taxes from the taxpayer. (R. 40-47.)

After a hearing and submission of briefs by the parties, the District Court, by order dated June 30, 1954, dismissed taxpayer's action and vacated its previously entered order to show cause. (R. 48.) In this order the District Court said (R. 48):

Plaintiff's second amended complaint contained no new issues of law other than those which were considered and determined by the Court when it dismissed the original and first amended complaint.

On July 21, 1954, taxpayer filed a notice of appeal to this Court from the District Court's "Order dismissing plaintiff's action entered on June 30, 1954." (R. 49.)

SUMMARY OF ARGUMENT.

The District Court correctly concluded that it did not have jurisdiction over taxpayer's suit to restrain collection of Federal income taxes. Section 3653(a) of the Internal Revenue Code of 1939, prohibits suits

to enjoin collection of income taxes except where certain judicially determined extraordinary and unusual circumstances exist or except where the provisions of subsection (a) of Section 272 of the Internal Revenue Code of 1939 apply.

Taxpayer's contention—that the conduct of Government agent was arbitrary and oppressive and that therefore the extraordinary or unusual circumstances authorizing a suit to restrain collection exist—is not supported by the allegations of his complaint or affidavits. These allegations show that if there was any improper conduct, it was that of taxpayer's agent and not the Government agents.

Taxpayer's contention—that the assessments here involved are not valid because no statutory deficiency notice was issued and that, therefore, in effect, his suit is authorized by subsection (a) of Section 272—is without merit. Subsection (a) of Section 272 authorizes suits to restrain collection only where collection is attempted after a statutory notice of deficiency has been issued and the deficiency there asserted has not been finally determined. Here, there was no statutory notice issued and, therefore, the provisions of subsection (a) of Section 272 do not apply. Taxpayer's reasoning—that even though no statutory deficiency notice was issued such a notice should have been issued and absence such notice collection should be enjoined—is erroneous. This is so because taxpayer executed waiver form 870 T.S. and the waiver was accepted by the Commissioner. Since the execution of the waiver and its acceptance creates a binding agree-

ment establishing the exact deficiency and further provides that the deficiency can be assessed and collected at any time, no separate formal deficiency determination or other notice thereof is required.

ARGUMENT.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER OF TAXPAYER'S SUIT TO ENJOIN COLLECTION OF FEDERAL TAXES BECAUSE OF THE PROHIBITION AGAINST SUCH SUITS PROVIDED FOR BY SECTION 3653(a) OF THE INTERNAL REVENUE CODE.

This is an appeal from "the order dismissing plaintiff's action entered on June 30, 1954." (R. 49.) In the order appealed from the District Court said (R. 48):

Plaintiff's second amended complaint presents no issues of law other than those which were considered and determined by the Court when it dismissed the original and first amended complaints.

Taxpayer does not challenge the fact that no new issues were presented by his second amended complaint and an examination of the original complaint (R. 3-6), the amendment thereto (R. 21-23) and the second amended complaint (R. 36-42) establishes that the second amended complaint reframed some of the allegations previously made but did not add anything new.

The basic issue of law considered and determined by the District Court was whether the allegations of taxpayer's complaints established its jurisdiction over the subject matter of the suit despite the prohibition

of Section 3653(a) of the Internal Revenue Code of 1939. (Appendix A, *infra*.) This is made manifest by the Collector's motions to dismiss and by the District Court's opinions (opinion entered October 15, 1954, and memorandum and order entered September 29, 1953) granting the Collector's motions.

The primary ground for the Collector's motions to dismiss was that the District Court did not have "jurisdiction over the subject matter in that this is a suit to enjoin collection of federal taxes." (R. 20, 33.) The District Court in its opinion and its memorandum and order recognized that these motions raised the question whether it had jurisdiction because of the specific statutory prohibition set out in Section 3653 (a) against suits to enjoin collection of federal taxes. (R. 25.) The District Court also recognized that collection has on occasion been enjoined despite the statutory mandate where there was a showing of extraordinary facts and circumstances such as a showing that the conduct of the Government's agents in assessing the tax was arbitrary or oppressive and that taxpayer contends that his allegations show the existence of a situation where collection should be enjoined despite the statutory prohibition. (R. 26.) The District Court concluded that the allegations of taxpayer's complaints did not show the existence of a "situation calling for the Court to exercise its equitable powers to enjoin collection of a tax." (R. 26, 34-35, 48.) Taxpayer's appeal from the District Court's order of June 30, 1954, therefore, presents on appeal the basic question whether the District Court correctly con-

cluded that the statutory provision of Section 3653(a) precluded it from entertaining taxpayer's suit to enjoin the collection of federal taxes. It is our position that the District Court correctly concluded that it did not have jurisdiction of the subject matter and that its order dismissing taxpayer's action is correct.

Section 3653(a) provides "Except as provided in Section 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Although it has been held that this statutory prohibition against maintaining a suit to restrain the assessment or collection of any tax in any Court may be relaxed in particular cases under extraordinary and entirely exceptional circumstances, it is clear that a claim on the part of the taxpayer that he does not owe a tax, or that it has been illegally and improperly assessed or that the collection of the tax will result in hardship does not constitute ground for the issuance of an injunction. If it were not so, the whole scheme of federal taxation would be frustrated. *The Jewel Shop of Abbeville, S. C. v. Pitts* (C. A. 4th), decided February 3, 1955 (1955 CCH, Par. 9206); *Millikin v. Gill*, 211 F. 2d 869 (C. A. 4th); *Matcovich v. Nickell*, 134 F. 2d 837 (C. A. 9th); *Mitsukiyo Yoshimura v. Alsup*, 167 F. 2d 104 (C. A. 9th); *Voss v. Hinds*, 208 F. 2d 912 (C. A. 10th); *Reams v. Vroom-Fehn Printing Co.*, 140 F. 2d 237 (C. A. 6th), 9 Mertens Law of Federal Income Taxation, Sections 49.170, 49.171, 49.172.

The nature of the extraordinary and exceptional circumstances which cause the prohibition of Section

3653(a) to fall away is described and explained in some detail in this Court's decisions in *Mitsukiyo Yoshimura v. Alsop*, *supra*, and *Matcovich v. Nickell*, *supra*. In the *Mitsukiyo Yoshimura* case, it was alleged that Government agents secured in 1944 from the taxpayer, a subject of Japan living near Pearl Harbor, a waiver (Form 870) of restrictions on assessment and collection of federal taxes for the years 1941, 1942 and 1943 by threatening to have the taxpayer interned as an enemy alien. This Court held that the conduct of the Government agents was fraudulent and coercive and gave rise to extraordinary circumstances which cause the statutory prohibition not to apply. In the *Matcovich* case, this Court affirmed the District Court's action in dismissing the taxpayer's suit to enjoin collection of federal taxes because of the prohibition of Section 3653(a). However, this Court recognized that situations could arise where the statutory prohibition should not apply. It was said (p. 838):

Section 3653 of the Internal Revenue Code prohibits suits to restrain the assessment or collection "of any tax" "in any court." Despite the positive prohibition of Section 3653, I.R.C., it has been held that there may be a case stated wherein injunctive relief properly may be granted to restrain the assessment or collection of a tax. See, for instance, *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 509, 510, 52 S. Ct. 260, 76 L. Ed. 422; *Graham v. DuPont*, 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965; *Allen v. Regents*, 304 U. S. 439, 445, 58 S. Ct. 980, 82 L. Ed. 1448. But such a case must, obviously, be the unusual, the extraordinary case. Mere illegality of the exac-

tion is not sufficient to justify a holding that the statute is not applicable (*Allen v. Shelton*, 5 Cir., 96 F. 2d 102), nor is hardship to the taxpayer. *Kaus v. Huston*, 8 Cir., 120 F. 2d 183, 185. We think Section 3653, I.R.C. applied except in a case wherein it is shown, in addition to the fundamental allegations necessary to obtain injunctive relief, that under no possibility could the attempted exaction be held legal (cf. *Miller v. Standard Nut Margarine Co.*, *supra*), or in the unusual and extraordinary circumstances such as confronted the court in *Graham v. DuPont*, 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965, and in *Allen v. Regents*, 304 U. S. 439, 445, 58 S. Ct. 980, 82 L. Ed. 1448. Appellant has stated no such case.

Other than these judicial exceptions to the broad prohibition of Section 3653(a), there are the specific exceptions in the statute itself: "Except as provided in Section 272(a), 871(a) and 1012(a), no 1012(a), no suit * * * may be maintained in any court."

Since the statutory exception provided for by Sections 871(a) and 1012(a) apply only where estate and gift taxes are involved, they are manifestly not material here. Therefore, the only statutory exception which may be material here is Section 272(a) of the Internal Revenue Code (Appendix A, *infra*). This section provides that where the Commissioner determines a deficiency in income taxes and sends a notice of such deficiency to the taxpayer by registered mail, then the taxpayer has ninety days in which to file a petition for redetermination with the Tax Court and that during this period——

no assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Accordingly, the provision authorizes the filing of suits to enjoin collection despite the prohibition of Section 3653(a) only when a statutory notice of deficiency has been mailed to the taxpayer and (1) the Collector before the ninety-day period has run attempts to distraint and collect and (2) where a petition for redetermination has been filed with the Tax Court in response to the deficiency notice within the prescribed ninety days and the Collector, without the authority of a jeopardy assessment, attempts to distraint and collect. Therefore, only where a deficiency notice has been issued can the taxpayer bring suit to restrain collection. Moreover, the taxpayer can waive the restrictions on assessment and collection provided for by Section 272(a) by signing a notice in writing agreeing to waive the restrictions.¹¹ Statutory author-

¹¹There are many practical reasons why it is advantageous to taxpayers to sign the waiver on restrictions. For one thing the signing of the waiver stops the running of interest and for another thing the waiver, as here, often involves a compromise of the tax liability.

ity for such waivers is found in subsection (d) of Section 272 which reads:

The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

Accordingly, where the taxpayer signs a notice in writing pursuant to the provisions of subsection (d), he waives the restrictions on assessment and collection provided for by subsection (a) and consequently cannot enjoin the Collector from proceeding, in accordance with the waiver agreement, to collect the agreed to tax. See *Associated Mutuals v. Delaney*, 176 F. 2d 179 (C. A. 1st); cf. *Victory v. Manning*, 128 F. 2d 415 (C. A. 3d).

Taxpayer in his first specification of error (Br. 6) and his argument (Br. 9-10) under point I asserts and argues that the conduct of the Government agents was arbitrary and oppressive. It, therefore, appears that taxpayer's first contention is that the District Court erred because it failed to conclude that his suit falls within the judicial exception to the prohibition of Section 3653(a). In his second and third specifications of error (Br. 6) and his arguments (Br. 10-14), taxpayer asserts and argues that the assessments were invalid because a statutory deficiency notice was not issued and therefore collection should be enjoined. It, therefore, appears that taxpayer's second contention is that the District Court erred because it failed

to conclude that his suit comes within the terms of the Section 272(a) statutory exception to Section 3653 (a). These contentions are without merit; the first because arbitrary and oppressive conduct is not sufficiently alleged; the second because no statutory notice of deficiency was required since taxpayer waived issuance of such a notice by executing waiver Form 870 T.S.

1. **Neither the Allegations of Taxpayer's Complaint or His Affidavits in Support Thereof Establish Arbitrary or Oppressive Conduct by Government Agents. Therefore, Extraordinary Circumstances Warranting a Suit to Restrain Collection Are Not Shown.**

Taxpayer alleges in his original complaint that for reasons adverse to his interest *his attorney* Abraham Buchman advised and induced him to execute, and he did execute, United States Treasury Department Form 870 T. S. waiver of restrictions on assessment and collection. Taxpayer does not allege that Government agents advised or induced him to sign the waiver. He does not allege that Government agents threatened, coerced or fraudulently caused him to execute the waiver form. Taxpayer's only allegation with respect to the conduct of the Government agents is (R. 4) that:

At all times that he [Abraham Buchman] so advised and represented plaintiff [taxpayer] said Abraham Buchman also represented persons having an interest in the matter of plaintiff's tax liability adverse to and in conflict with plaintiff's interest which adverse interest was known to said representatives of the Bureau of Internal Rev-

enue but was not known to plaintiff or disclosed to him by said Abraham Buchman.

Clearly these allegations do not show that taxpayer executed the waiver on restrictions because he was coerced, threatened or otherwise treated arbitrarily or oppressively by Government agents. On the contrary, his allegations reveal as the District Court observed (R. 26) :

In the case at bar the improper conduct, if any, at the conferences at which the compromises were reached, was that of the plaintiff's agents and not that of the government's representatives. This does not establish the "extraordinary circumstances" or "arbitrary and oppressive conduct of government agents." This case does not present a situation calling for this court to exercise its equitable powers to enjoin the collection of a tax.

Taxpayer does not deal with the question whether the allegations of his complaint show arbitrary or oppressive conduct. Rather, he argues (Br. 9-10) that his affidavit and the affidavit of Wareham C. Seaman "set forth sufficient allegations to justify a finding that the action of the defendant in making the assessment and levying against appellant was arbitrary and oppressive." It is our position that the allegations of the affidavits are not material and that even if they are material they fall far short of showing the extraordinary and unusual circumstances which warrant a suit to restrain despite the broad prohibition. The allegations of the affidavits are not material because the Collector's motions to dismiss (R. 20, 33) placed

in issue only the sufficiency of the allegations of the complaint. Where, as here (R. 34), the District Court decides the question raised on the motion to dismiss on the basis of the allegations of the complaint alone, then on review only those allegations are to be considered. See *Land v. Dollar*, 330 U. S. 731; *Gibbs v. Buck*, 307 U. S. 71, 72. Taxpayer was given two opportunities to amend his complaint so that he could state in his complaint sufficient grounds to justify the relief he sought. (R. 21-23, 34, 36-42.)

In any event, the allegations of the affidavits do not show the existence of extraordinary or unusual circumstances warranting an injunction. This is so because those allegations show that taxpayer signed the waiver in reliance upon representations of his own attorney, not upon representations of the Government agents (R. 10-12); that no force or threats were used by the Government (R. 10-15) and that contrary to taxpayer contentions (Br. 9), the case was considered administratively even after a compromise settlement had been effectuated. (R. 16-19.) Thus, it is clear from the affidavits that taxpayer was not forced to compromise and settle his tax liabilities by arbitrary or oppressive conduct by Government agents. Accordingly, his affidavits do not show the existence of extraordinary circumstances which might warrant his suit to restrain collection. *Jewel Shop of Abbeville, S. C. v. Pitts, supra*; *Matcovich v. Nickell, supra*; *Mitsukiyo Yoshimura v. Alsup, supra*.

Taxpayer, even though he cannot show directly arbitrary or coercive conduct, apparently would like this

Court to infer that there was such conduct because Government agents supposedly knew that his (taxpayer's) agents represented interests adverse to taxpayer and that therefore they should have refused to accept his waiver or should have subsequently set it aside. However, there is nothing in the affidavits which shows definitely that the Government agents knew that taxpayer's attorney was not actually acting in taxpayer's interest.¹² Furthermore, taxpayer admits (Br. 9) that the Collector is not charged with the responsibility of determining the good faith of his (taxpayer's) representatives.

Moreover, taxpayer's second amended complaint does not allege that the conduct of the Government agents was arbitrary and oppressive, nor does it incorporate by reference the allegations to this effect set out in the original complaint. (R. 36-42.) Therefore, it appears that taxpayer abandoned this claim in the District Court and, furthermore, that taxpayer's failure to reallege the allegations of the original complaint made it impossible for the District Court to grant an injunction on the ground that the conduct of Government agents was arbitrary and oppressive. Accordingly, it would appear that taxpayer's first specification (Br. 6), and his argument thereunder (Br. 9-10), should not be considered by this Court.

¹²It is significant that taxpayer's tax liability was reduced by about \$20,000 as a result of the compromise agreement embodied in the waiver. (R. 9, 13.)

2. **The Assessments Were Clearly Valid and the Commissioner Was Not Required to Issue a Statutory Notice of Deficiency Because Taxpayer Executed Waiver Form 870 T. S. Therefore, Collection Could Not Be Enjoined.**

As noted above, the only statutory exception to the prohibition against suits to restrain collection of federal income taxes is that set forth in Section 272(a). As also noted above, this exception only operates where a statutory notice of deficiency has been issued and collection is commenced either (1) when the ninety-day period has not run or (2) the taxpayer has filed a petition for redetermination with the Tax Court and that Court's determination has not become final. Therefore, no suit, based on the authority of Section 272(a), to restrain collection can be maintained unless a statutory notice of deficiency has been issued.¹³ Here, the fundamental fact is that no statutory notice of deficiency was issued or required to be issued. It follows, therefore, that taxpayer has no basis in law for his action.

The substance of taxpayer's argument under points II and III (Br. 10-14) in the absence of a sound factual basis is that a statutory notice of deficiency should have been issued; that because it was not issued the assessment was invalid and consequently collection should be enjoined. Taxpayer contends (Br. 10-14) that a deficiency notice was required (1) because the assessments were jeopardy assessments and Section 273(b) of the Internal Revenue Code of 1939 (Appendix A, *infra*) required a statutory notice of defi-

¹³Unless the statutory notice is issued, the taxpayer cannot file a petition for redetermination with the Tax Court. Section 272(a).

ciency to be issued sixty days after such assessment and (2) because, even if the assessments were not a jeopardy assessments there must be a determination of deficiency as provided for in subsection (a) of Section 272. The short and complete answer to these two contentions is that the execution by the taxpayer of waiver Form 870 T.S. eliminates any necessity for either a determination of deficiency under Section 272(a) or for a jeopardy assessment under Section 273(a) of the Internal Revenue Code of 1939 (Appendix A, *infra*). In *Associated Mutuals v. Delaney*, *supra*, the Court of Appeals for the First Circuit thoroughly considers the effect of the execution of a waiver similar to the one now before this Court. In response to an argument, similar in all material respects to that made by taxpayer here under his point III, the Court said (pp. 182-183):

Appellant advances a separate point, that the waiver of the restrictions on assessment and collection of the proposed deficiency was ineffective because it was filed before a formal deficiency notice under § 272(a) was sent. The language of the statute itself refutes this argument. Section 272(d) gives the taxpayer the right to submit a waiver "at any time", and it is to the taxpayer's advantage to file a waiver to a proposed deficiency because I.R.C. § 292(a), 26 U.S.C.A. § 292(a), imposes interest on deficiencies at the rate of 6% per year from "the date prescribed for the payment of the tax * * * to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed

whichever is the earlier." Several cases hold that a waiver to a proposed deficiency is effective to stop the running of interest thirty days after filing. *Moore v. Cleveland Ry. Co.*, 6 Cir., 1940, 108 F. 2d 656; *Roos v. United States*, 1940, 31 F. Supp. 144, 90 Ct. Cl. 482; *Diamond Alkali Co. v. Driscoll*, D.C., W. D. Pa. 1940, 27 A.F.T.R. 1083. Furthermore, the right is given the taxpayer by § 272(d) "to waive the restrictions provided in subsection (a) of this section on the assessment and collection" of a deficiency; and reference back to § 272(a) discloses that the first of these "restrictions", or conditions which must be met before the Commissioner is authorized to make assessment and distraint, is the mailing to the taxpayer of a notice of the determination of a deficiency. As stated by Dean Griswold, a waiver to a proposed deficiency, under § 272(d), "allows the Commissioner to assess and collect the tax without first sending the taxpayer a deficiency letter which can be used as the basis for a petition in the Tax Court." Note, 57 Harv. L. Rev. 912, 914 n. 16 (1944). See also Griswold, *Cases and Materials on Federal Taxation* 90 (2d ed. 1946); 9 Mertens, *Law of Federal Income Taxation* §§ 49.02, 49.37, 49.99, 49.100 (1943); 3 CCH 1949 Fed. Tax Rep. par. 1354.847. The Monograph of the Attorney General's Committee on Administrative Procedure, pt. 9, *Administration of Internal Revenue Laws*, reprinted as Sen. Doc. No. 10, 77th Cong., 1st Sess., 11 n. 55 (1941), states: "If no notice of deficiency has been sent when the waiver is signed, its execution in effect waives the privilege of going to the Board of Tax Appeals, since the jurisdiction of the Board depends upon the send-

ing of a deficiency notice which the waiver relieves the Commissioner of doing." Cf. *Victory v. Manning*, 3 Cir., 1942, 128 F. 2d 415; see *Bayson v. Commissioner*, 2 Cir., 1948, 166 F. 2d 1008, 1009-1010.¹⁴

In subsequent parts of this same opinion, the First Circuit fully answers taxpayer's argument on the effect of the legislative history of Section 272(d). See *Associated Mutuals v. Delaney*, *supra*, p. 183. The First Circuit also answered taxpayer's arguments based on this Court's decisions in *Mutual Lumber Co. v. Poe*, 66 F. 2d 904, certiorari denied, 290 U. S. 706 and *McCarthy Co. v. Commissioner*, 80 F. 2d 618, certiorari denied, 298 U. S. 655 when it pointed out (pp. 183-184):

Hence, we conclude that the waiver appellant filed to the deficiency proposed by the revenue agent obviated the need for the Commissioner to send a formal deficiency notice and precluded appeal to the Tax Court. *Mutual Lumber Co. v. Poe*, 9 Cir., 1933, 66 F. 2d 904, certiorari denied 1934, 290 U.S. 706, 54 S. Ct. 373, 78 L. Ed. 606, and *McCarthy Co. v. Commissioner*, 9 Cir., 1935, 80 F. 2d 618, certiorari denied 1936, 298 U.S. 655, 56 S. Ct. 675, 80 L. Ed. 1381, involved different problems. In so far as their reasoning may be contrary to our present decision, we do not regard

¹⁴Manifestly, if notice of a deficiency determination is not required under subsection (a) of Section 272, it would not be required under subsection (b) of Section 273. Furthermore, there would be no need for the collector to make a determination that collection was in jeopardy and make a jeopardy assessment where the waiver permits him to collect at any time without making such a determination.

the denials of certiorari or the absence of subsequent statutory disapproval as indicating acceptance of such reasoning. See Report of Subcommittee on Internal Revenue Taxation of House Committee on Ways and Means, 75th Cong., 3d Sess., 53-54 (1938), quoted in Seidman, *Legislative History of Federal Income Tax Laws 95-96* (1938); *Moore v. Cleveland Ry. Co.*, *supra*; *Cleveland v. United States*, 1946, 329 U.S. 14, 21, 22, 67 S. Ct. 13, 16, 17, 91 L. Ed. 12, concurring opinion; cf. *Girouard v. United States*, 1946, 328 U.S. 61, S. Ct. 826, 90 L. Ed. 1084.

East Bay Water Co. v. McLaughlin, 24 F. Supp. 222 (N. D. Cal.) relied upon by taxpayer (Br. 14) is distinguishable from the present case for the same reasons that the *Mutual Lumber and McCarthy Co.* cases are distinguishable. None of these cases involved the question here—whether a waiver form 870 T.S. executed by the taxpayer and accepted for the Commissioner by his authorized agents was invalid because a statutory deficiency notice had not been issued previously. In the *Mutual Lumber and McCarthy Co.* cases the question was whether the Commissioner could issue a statutory notice of deficiency to stop the statute of limitations from running where the taxpayer had executed a form 870 waiver. In the *East Bay Water Co.*, the question was whether taxpayer's execution of a waiver which was not accepted by the Commissioner through his authorized agents was valid and stopped the accrual of interest where a statutory notice of deficiency had not previously been issued. There is a marked and substantial difference between

waiver form 870 and waiver form 870 T.S. Although both are waivers under Section 272(d) and authorize immediate assessment and collection without the sending of a statutory notice of deficiency, Form 870 does not contain a binding agreement on the part of either the Commissioner or the taxpayer as to the tax deficiency set up therein. See *United States v. Goldstein*, 189 F. 2d 752 (C. A. 1st). It is a unilateral waiver by the taxpayer under Section 272(d). Form 870 T.S., on the other hand, is designed to be a bilateral agreement which will form the basis for a final closing agreement and it provides that if the waiver (proposal) is accepted by or on behalf of the Commissioner "the case shall not be reopened nor shall any claim for refund be filed respecting the taxes * * *" (Appendix A, *infra*). Clearly, therefore, the Commissioner's acceptance of the waiver form 870 T.S. is the equivalent of a final determination of the deficiency since his acceptance can only imply that the deficiency has finally been determined to be the sum agreed upon in the waiver. Since the Commissioner does make a final determination of deficiency when he accepts and agrees to be bound by the waiver agreement (Form 870 T.S.), it follows that this Court's reason for holding the waiver and assessment invalid in the *Mutual Lumber* and *McCarthy Co.* cases does not apply here. Furthermore, although corresponding provisions of the Internal Revenue Code of 1954 are not applicable to the present problem, it is clearly evident, contrary to taxpayer's assertion (Br. 14), that the execution of the waiver provided in subsection (d) of Section

6213 makes it unnecessary for there to be a formal deficiency determination. Subsection (d) of Section 6213 of the Internal Revenue Code of 1954 reads:

The taxpayer shall at any time (*whether or not a notice of deficiency has been issued*) have the right by a signed notice in writing filed with the Secretary or his delegate, to waive restrictions provided in subsection (a) on the assessment or collection of the whole or any part of the deficiency. (*Italics supplied.*)

Clearly the execution of waiver form 870 T.S. by the taxpayer and the acceptance of that waiver by the Commissioner precluded the necessity of making a formal deficiency determination or a jeopardy assessment. Accordingly, taxpayer's suit to restrain collection is not authorized by subsection (a) of Section 272.

The real nub of taxpayer's contention is that he does not have an adequate remedy and means to litigate his tax liability because he has executed waiver form 870 T.S. which he feels to be invalid. Actually, taxpayer does have a complete and adequate remedy by way of a refund suit. See *Phillips v. Commissioner*, 283 U.S. 589; *In Re State Railroad Tax Cases*, 92 U.S. 575, 613; *Millikin v. Gill*, *supra*. There is nothing to prevent taxpayer from bringing such a suit and there testing the validity of the waiver form 870 T.S. The Government does not seek to avoid litigation of any meritorious claim. It does, however, feel that where, as here, there is an adequate remedy at law; that the administration of the tax laws should not be

prejudiced and delayed by the undesirable and unnecessary use of an injunction suit.

CONCLUSION.

The District Court's order dismissing taxpayer's action is correct and should be affirmed.

Dated, San Francisco, California,
March 28, 1955.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

ALONZO W. WATSON, JR.,

Attorney, Office of Regional Counsel,

Internal Revenue Service.

(Appendices A and B Follow.)



Appendices A and B.



Appendix A

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 562, 59 Stat. 669] *Petition to the Tax Court of the United States*.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(d) *Waiver of restrictions*.—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the

restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 1946 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * * *

(26 U.S.C. 1946 ed., Sec. 273.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3653.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.272-1. ASSESSMENT OF A DEFICIENCY.

* * * * *

(5) The taxpayer may at any time by a signed notice in writing filed with the Commissioner waive the restrictions on the assessment of the whole or any part of the deficiency. The notice must in all cases be filed with the Commissioner. The filing of such notice with the Tax Court does not constitute filing with the Commissioner within the meaning of the Internal Revenue Code. After such waiver has been acted upon by the Commissioner and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.

* * * * *

Appendix B

CERTIFICATE.

I hereby certify that the annexed photostat constitutes a true copy of a duplicate original Form 870-TS offer of waiver of restrictions on assessments and collection of deficiency in tax accepted on behalf of the Commissioner on December 16, 1949, and of Pacific Division, Technical Staff Action Memorandum to which said Form 870-TS is attached, and that the same constitute official records of the Bureau of Internal Revenue in my custody.

Glen T. Jamison,
Director of Internal Revenue.

C:TS:PD
SF:HMS

Form 870-TS
Treasury Department
Internal Revenue Service
(Revised Sept. 1941)

(Date Received)
Nov. 2, 1949
Technical Staff
Pacific Division
San Francisco Office

OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENTS AND COLLECTION OF
DEFICIENCY IN TAX

Accepted Dec. 16, 1949

(Signed) Stewart Berkshire
(Head of Division)

Re: Bartolomeo Monge
Oakdale, California

Pursuant to the provisions of section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, and hereby offers to consent to the assessment and collection of the following deficiency or deficiencies in tax and penalty:

e year ended December 31, 1943	income tax in the sum of \$ 5,577.96
e year ended December 31, 1944	income tax in the sum of \$ 7,111.45
e year ended December 31, 1945	income tax in the sum of \$ 4,991.83
e year ended December 31, 1946	income tax in the sum of \$ 7,005.51
e year ended	in the sum of \$
ting to the total sum of	\$24,686.75

together with interest thereon as provided by law.

This Offer of Waiver of Restrictions is subject to acceptance by or on behalf of the Commissioner of Internal Revenue, on the basis of the adjusted liability as hereinabove proposed, and is to take effect as a waiver of restrictions then filed with the Commissioner, from the date said adjusted liability is accepted by or on behalf of the Commissioner as a basis for the closing of the case, and if not thus accepted will have no force or effect.

If this proposal is accepted by or on behalf of the Commissioner, the case shall not be reopened nor shall any claim for refund be filed or prosecuted respecting the taxes for the year(s) above stated, in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or of an important mistake in mathematical calculations; and the taxpayer also agrees: (1) To make payment of the above deficiency, together with interest, as provided by law, promptly upon receipt of notice and demand from the Collector of Internal Revenue, and not to file an offer in compromise respecting such liability; and (2) upon request of the Commissioner to execute at any time a final closing agreement as to the tax liability, on the

foregoing basis, for said year(s) under the provisions of section 3760 of the Internal Revenue Code.

Bartolomeo Monge
(Taxpayer)

.....
(Taxpayer)

Rt-1-Box 61—Oakdale, Calif

Date Nov 2th 1949

By.....

NOTE.—The execution and filing of this offer of waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this offer of waiver is executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the offer of waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

(This copy to be retained by petitioner)

RAC

C:TS:PD

SF:HMS

PACIFIC DIVISION, TECHNICAL STAFF
ACTION MEMORANDUM

In re: Conference Report dated T.S. Nos. (1) 4855
 July 20, 1949 (2) A-4855
 Symbols: IRA:Conf. No. 12413

Taxpayers:

- (1) Bartolomeo Monge
- (2) Mary Monge
Oakdale, California

Represented by:

A. M. Buchman
New York, New York

Collection District:

First, California

<u>Year</u>	<u>Kind of Tax</u>	<u>Findings of I. R. Agent in Charge</u>		<u>Date of Limitation</u>
		<u>Deficiency</u>	<u>Overassessment</u>	
(1) 1943	Income	\$ 9,278.95	—	6/30/50
	50% Penalty	4,639.48	—	
1944	Income	15,972.93	—	6/30/50
	50% Penalty	7,986.36	—	
1945	Income	7,996.54	—	6/30/50
	50% Penalty	3,998.27	—	
1946	Income	8,959.99	—	3/15/50
	50% Penalty	4,479.99	—	
(2) 1943	Income	—	\$ 458.61	6/30/49
1944	Income	—	617.00	3/15/48
1945	Income	—	390.00	3/15/46
1946	Income	—	643.00	3/15/50

Internal Revenue Agent in Charge,
San Francisco, California.

I return herewith the files relating to the above-described cases, accompanied by a statement of the issues, the relevant facts and law, and the conclusion reached, with the grounds therefor. This statement has my approval and is incorporated as a part of the record of the cases. The Staff Division has reached the following—

Bartolomeo Monge

Mary Monge

Action Memorandum

DECISION:

	<u>Year</u>	<u>Kind of Tax</u>	<u>Deficiency</u>	<u>Overassessment</u>
(1)	1943	Income	\$5,577.96	—
		50% Penalty	2,788.98	—
	1944	Income	7,111.45	—
		50% Penalty	3,555.72	—
	1945	Income	4,991.83	—
		50% Penalty	2,495.92	—
	1946	Income	7,005.51	—
		50% Penalty	3,502.76	—
			<hr/>	
			\$37,030.13	
(2)	1943	Income	—	\$458.61*
	1944	Income	—	617.00*
	1945	Income	—	390.00*
	1946	Income	—	643.00

*Refund not allowed for the years 1943 to 1945, inclusive, since statutory period has expired.

The taxpayer accepts the foregoing determination, as set forth in the accompanying agreement, which waives the statutory restriction on assessment and collection.

Appropriate action should be taken in accordance with paragraph 5 of Commissioner's Mimeograph, R. A. No. 1014, T. S. No. 57.

By direction of the Commissioner:

(Signed) Stewart Berkshire

Head of Division.

Date: Dec 16 1949

HMSorrell/pan
12/13/49

HMS
Dec 14 1949

WHL
Dec 15 1949